NO. 41932-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH SULLIVAN, III

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Christine Pomeroy, Judge

REPLY BRIEF OF APPELLANT

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A. FACTS IN REPLY

This case involves a simple issue. Appellant Joseph Sullivan was initially sentenced to a 9- to 12-month term of community custody as authorized by the statute in effect at the time of this offense. After a successful appeal, his case was remanded for resentencing. In the interim, the legislature amended the community custody statute. Based on the amended statute, the remand court imposed a 12-month term of community custody. Brief of Appellant (BOA) at 1-6. The state agrees with Sullivan's statement of facts,[1] but disagrees that the 12-month term is more punitive than the 9- to 12-month term initially authorized and imposed.

B. ARGUMENT

THE STATE'S WAIVER ARGUMENT IS MERITLESS.

On appeal Sullivan argues the 12-month term was erroneous. The error stemmed either from the trial court's application of the wrong statute, or from a violation of the ex post facto clauses of the state and federal constitutions. BOA at 4-8. The state responds that Sullivan cannot raise these challenges for the first time on appeal. BOA at 1-6.

[1] Brief of Respondent (BOR) at 1.

The state first claims the error is not "manifest" under RAP 2.5(a)(3), citing three cases addressing trial errors that were raised for the first time on appeal. BOR at 2-3 (citing State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009); State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007); and State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995)). Sullivan does not raise a trial error in this appeal; these cases, therefore, are not on point.[2]

An unlawful sentence may be challenged for the first time on appeal. BOA at 4-5. A sentence may be unlawful where it exceeds the trial court's authority or violates the constitution. The rule is well-settled,[3] but the state ignores it.

Amendments to the SRA in 2008 and 2009 muddy the precise characterization of the trial court's error. The statute in effect when the offense was committed required a 9- to 12-month term. Various amendments show the legislature's intent to retroactively authorize a 12-month term, but only if constitutionally permissible. BOA at 6 &

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[2] Even so, manifest violations of the ex post facto clause may occur at trial and be raised for the first time on appeal. See e.g., State v. Parker, 132 Wn.2d 182, 191-92 & n.14, 937 P.2d 575 (1997); State v. Hudspeth, 63 Wn. App. 683, 686-88, 821 P.2d 547 (1992).

[3] BOA at 4-5; see also, State v. Sims, 171 Wn.2d 436, 444 n.3, 256 P.3d 285 (2011); State v. Bahl, 164 Wn.2d 739, 744-45, 193 P.3d 678 (2008).

notes 7-8. The amendment violates the ex post facto clause when applied to Sullivan's sentence, a result the legislature did not intend.[4] Therefore, the 12-month term is neither constitutionally nor statutorily authorized.

The state properly concedes community custody is punishment (BOR at 5), but claims there is no ex post facto violation because Sullivan has not shown a difference between a 9- to 12-month term of community custody and a 12-month term of community custody. BOR at 3-6. Under the state's theory, the possibility that Sullivan might serve 9 months, rather than 12 months, makes no constitutional difference. The state calls this "speculation." BOR at 3.

On this point Sullivan cited Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981) (BOA at 7, n.9). Weaver invalidated a Florida statute that lessened an inmate's ability to earn "gain time" and applied retroactively to crimes committed before its effective date. Gain time under the former statute was not automatic; a prisoner might not earn it and the prison had discretion not to award

[4] See also, BOR at 4-5 (the state agrees the legislature did not intend an unconstitutional application of the amendments).

it.[5] This made no difference to the Supreme Court, which held the statute violated the ex post facto clause because it substantially altered the consequences and changed the quantum of punishment. What the state now calls "speculation" – i.e. the possibility that a person might not earn the shorter sentence – was not material to the Weaver court's ex post facto analysis. Weaver, 450 U.S. at 28-33. Nor is it material here.

The state fails to cite Weaver, instead citing two Washington cases that include a small quote from Weaver. BOR at 6 (citing State v. Ward, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994) and In re Powell, 117 Wn.2d 175, 184-85, 814 P.2d 635 (1991)). A fairer and more complete quote shows the Weaver court considered this precise issue and decided it squarely against the state:

> Contrary to the reasoning of the Supreme Court of Florida, a law need not impair a "vested right" to violate the ex post facto prohibition. Evaluating whether a right has vested is important for claims under the Contracts or Due Process Clauses, which solely protect pre-existing entitlements. The presence or absence of an affirmative, enforceable right is not relevant, however, to the ex post facto prohibition, which forbids the

[5] The Florida Supreme Court had recognized, as a matter of state law, that "gain time allowance is an act of grace rather than a vested right and may be withdrawn, modified, or denied." Weaver, 450 U.S. at 28 (quoting Harris v. Wainwright, 376 So.2d 855, 856 (Fla. 1979)). The Weaver Court did not disturb this state law determination.

> imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.

Weaver, at 29-31 (notes and citations omitted).

Weaver was decided by a unanimous Court.[6] It remains good law on this point.[7] Relying on Weaver, the Washington Supreme Court has held that by limiting the possibility of early release, similar retroactive statutes increase punishment and are unconstitutional. See e.g., In re Smith, 139 Wn.2d 199, 207-08, 986 P.2d 131 (1999) (citing Weaver). Weaver also followed the Court's decision in Lindsey v. Washington, 301 U.S. 397, 401, 57 S.Ct. 797, 799, 81 L.Ed. 1182 (1937). Lindsey invalidated the retroactive application of a Washington statute that imposed a mandatory 15-year term of imprisonment, when the former statute allowed for the possibility of

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[6] Three Justices concurred; there was no dissent.

[7] Weaver has been cited in more than two dozen published Washington decisions.

parole. As in Weaver, the "speculative" nature of parole did not affect the Supreme Court's holding that the statute violated ex post facto prohibitions. Lindsey, 301 U.S. at 400-02.

What the state asks this Court to dismiss as "speculation," the Supreme Courts of Washington and the United States have held unconstitutional. The unconstitutional term of community custody imposed upon Sullivan is unlawful and is properly challenged in this appeal.

C. CONCLUSION

As argued in the opening brief, this Court should vacate the 12-month period of community custody and remand for imposition of a 9- to 12-month period.

DATED this 29th day of September, 2011.

Respectfully submitted,

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JOSEPH SULLIVAN,	)	
	)	
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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29TH DAY OF SEPTEMBER 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOSEPH SULLIVAN
NO. 760962
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF SEPTEMBER 2011.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

September 29, 2011 - 1:41 PM

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